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REAL PROPERTY: LANDLORD AND TENANT, MECHANICS' AND MATERIALMEN'S LIENS, AND FORECLOSURE

by

Charles R. Butler*

I. LANDLORD AND TENANT

A. Noncompetition Covenants

The Texas Supreme Court considered whether a lease covenant for non-competition was void as a violation of Texas antitrust laws¹ in *City Products Corp. v. Berman*.² In *City Products* the landlord, a limited partnership, executed a lease to the tenant, a variety store, that contained a protective covenant prohibiting the landlord from leasing any part of the building or any other space in another building of the landlord located within 1,000 feet of the variety store to a business similar to that of the tenant.³ The landlord did not own the realty but had the right to lease the premises.⁴ Berman, one of the general partners of the limited partnership, leased a building that was within 1,000 feet of the variety store to a competing variety store, Perry Brothers, Inc. The tenant filed suit against Berman, Perry Brothers, and all of the landlord partners to enforce the noncompetition covenant and for damages. Berman and Perry Brothers

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1. TEX. BUS. & COM. CODE ANN. § 15.04 (Vernon 1968).

2. 610 S.W.2d 446 (Tex. 1980).

3. The covenant provided:

That the Landlord will not, during the term hereof, or any renewal or extension hereof, lease or permit to be used, any portion of the building in which demised premises are situated or any portion of any other building or premises controlled by the landlord located within one thousand (1000) feet of the herein demised premises, for any business similar to the business of the Tenant, that is to say, for any variety store or any business conducted under the name of a five and ten cent store, five cents to one dollar store, or similar name.

Id. at 447.

4. The original lease was executed in 1958 by the Estate of Abe Levy, the Estate of Ike Levy, and Max Berman. The term of the lease was extended three times by supplemental agreements. The extension in question, the third supplemental agreement, listed as landlord Freda Levy, I. A. Loeb, Fannie Loeb, Max Berman, Sydel Berman, Morris L. Siegel, Helen Siegel, William Sheridan, and Hattie Sheridan as general partners doing business as A & I Levy Estates, a limited partnership. Morris Siegel and William Sheridan did not own any of the realty; their wives, however, were owners. *Id.*

defended, claiming that the covenant violated the Texas antitrust statute as an illegal combination and was therefore void. The trial court rejected the antitrust defenses, enjoined the competing variety store, and awarded punitive damages.⁵ The court of civil appeals reversed, holding that the covenant violated section 15.04 of the Texas Business and Commerce Code.⁶

Addressing the issue of whether the noncompetition covenant violated section 15.04,⁷ the supreme court noted its decision in *Schnitzer v. Southwest Shoe Corp.*⁸ In *Schnitzer* the court found that an agreement between two merchants who owned adjoining property that restricted the use by one merchant's tenant violated the antitrust laws.⁹ The *Berman* court noted, however, that restrictions were permissible in certain situations; quoting its decision in *Schnitzer*, the court stated:

One of the exceptional situations is that in which an owner, lessor or one in control of premises agrees with another person that the other person shall have an exclusive right or privilege on the premises or that the other person will sell on the premises only the products or merchandise of the owner. . . . Contracts or agreements of this character are upheld when they are collateral or incidental to a lawful lease or grant of premises in which the lessor or grantor has a property interest.¹⁰

Relying on the *Schnitzer* decision, the court stated that it would be permissible for a lessor to covenant not to compete with a lessee and for a lessor, within reason, to covenant not to use or permit use of his other property by others in competition with the lessee.¹¹ Despite the fact that the partnership did not own the property, the court concluded that the partnership was a lessor or one in control of the property and, therefore, could bind the partners to the noncompetition covenant.¹² The court, therefore, holding that the covenant did not violate the antitrust statutes, reversed that part of the decision of the court of civil appeals.¹³ In addition, the court upheld the civil appeals decision holding that punitive damages were not allowable without proof of actual damages.¹⁴

During the survey period, the court of civil appeals also considered the

5. 610 S.W.2d at 447-48.

6. 579 S.W.2d 313 (Tex. Civ. App.—Eastland 1979).

7. TEX. BUS. & COM. CODE ANN. § 15.04 (Vernon 1968) provides:

(a) Every monopoly, trust, and conspiracy in restraint of trade, as defined in Sections 15.01, 15.02, and 15.03 of this code, respectively, is illegal and prohibited. . . .

(b) An agreement violating the prohibition against a monopoly, trust, or conspiracy in restraint of trade contained in Subsection (a) of this section is void and unenforceable in law or equity.

8. 364 S.W.2d 373 (Tex. 1963).

9. *Id.* at 374-75.

10. 610 S.W.2d at 448 (citing *Schnitzer*, 364 S.W.2d at 374-75).

11. 610 S.W.2d at 448.

12. *Id.* at 449. See also *Kroger v. J. Weingarten, Inc.*, 380 S.W.2d 145 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.) (trial court's injunction of supermarket pursuant to noncompetition agreement in lease reversed).

13. 610 S.W.2d at 450.

14. *Id.*

application of an exclusionary lease covenant in *Bache Halsey Stuart Shields, Inc. v. Alamo Savings Association*.¹⁵ In *Bache* the lessee, a stock brokerage firm, relocated within San Antonio in order to "get away from" its competitor, Merrill Lynch. When Bache moved, it was informed of the landlord's plan to build an adjoining tower connected by an atrium to the building containing Bache's new offices. The lease contained an exclusionary clause that provided that the lessor "does hereby grant [Bache] the right to exclude any company engaged in the securities brokerage business as lessee from the Alamo Savings Tower and the Gunter Hotel Premises."¹⁶ The lessor changed its plans and did not connect the two buildings. After completion of the new tower, the landlord leased space in the new building to Merrill Lynch.

Thereafter, Bache filed suit to enforce its exclusionary clause. The trial court granted summary judgment for the lessor on the grounds that the clause applied only to Bache's building. The court of civil appeals determined that the clause contained a latent ambiguity and, therefore, proof of the surrounding facts and circumstances were admissible to ascertain the true intent of the parties.¹⁷ The court remanded the case to allow the introduction of evidence of the surrounding circumstances to help determine the intent of the parties as to the effect of the exclusionary clause.¹⁸

B. *Ad Valorem Taxes on Leasehold Estate*

The Amarillo court of civil appeals considered whether a tenant was liable for ad valorem taxes on the leasehold estate in *A. J. Robbins & Co. v. Roberts*.¹⁹ The landlord and tenant in *Robbins* entered into a purchase contract whereby the tenant agreed to buy substantially all of the assets of a lumber company. They also entered into a lease agreement covering the real property of the business. The purchase contract contained a provision calling for the proration of the ad valorem taxes to the date of the closing.²⁰ The lease, however, did not contain any language addressing ad valorem taxes. After consummation of the sale and lease and upon the receipt of the tax statements for the leasehold premises, the landlord requested the tenant to pay the ad valorem taxes. When the tenant refused, the landlord filed suit. The trial court, reading the contract and lease together as a single transaction, held the tenant liable for the taxes.²¹

In its decision, the court of civil appeals noted that under Texas law the owner of realty was liable for ad valorem taxes²² and moreover a lessee

15. 611 S.W.2d 706 (Tex. Civ. App.—San Antonio 1980, no writ).

16. *Id.* at 707.

17. *Id.*

18. *Id.* at 708.

19. 610 S.W.2d 854 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.).

20. *Id.* at 855. The clause provided: "All ad valorem taxes . . . shall be prorated between the parties down to the date of closing." *Id.*

21. *Id.*

22. *Id.* at 855-56. The court cited TEX. REV. CIV. STAT. ANN. art. 7171 (Vernon 1960) (repealed 1979, effective Jan. 1, 1982).

was not liable for taxes merely because of possession.²³ The court recognized, however, that a lessee may become liable for payment of ad valorem taxes by contractual agreement with the lessor.²⁴ If a lessor and lessee so contract, the lessor still remains ultimately liable for the taxes but is entitled to maintain an action against the lessee for the tax payment.²⁵ The landlord contended that the purchase contract and the lease should be read as one document because they represented a single transaction, and that the tax proration provision contained in the purchase contract, therefore, provided the contractual basis for shifting the tax liability to the tenant. The court of civil appeals disagreed, holding that despite the fact that the two documents represented one transaction and should be construed together,²⁶ a paragraph from one document could not be transplanted into the other document because each contract was complete in itself having its own separate purpose.²⁷ The court holding for the tenant, therefore, found that the tax proration clause contained in the purchase contract applied only to the personalty and not to the realty.²⁸

C. *Obligation to Repair*

The court of civil appeals affirmed a trial court decision that held that a lease provision requiring the lessor to pay for repairs did not require the lessor to make the needed repairs in *National Living Centers, Inc. v. Cities Realty Corp.*²⁹ The lessee leased a building for use as a nursing home. Consequently, the building was required to meet certain standards in order to acquire the requisite state license.³⁰ The lease contained a provision

23. *Id.* at 856.

24. 610 S.W.2d at 856 (citing *Dependable Motors, Inc. v. Smith*, 433 S.W.2d 933 (Tex. Civ. App.—Austin 1968 writ ref'd n.r.e.) (lessee held liable for ad valorem tax increases as provided in lease)).

25. 610 S.W.2d at 856.

26. The court cited with approval the holding in *Miles v. Martin*, 159 Tex. 336, 341, 321 S.W.2d 62, 65 (1959), which stated:

It is well settled that separate instruments executed at the same time, between the same parties, and relating to the same subject matter may be considered together and construed as one contract. This undoubtedly is sound in principle when the several instruments are truly parts of the same transaction and together form one entire agreement. It is, however, simply a device for ascertaining and giving effect to the intention of the parties and cannot be applied arbitrarily and without regard to the realities of the situation.

610 S.W.2d at 856.

27. 610 S.W.2d at 856-57. The court determined that the contracts did not need to be read together in order to ascertain a single contractual obligation. *Id.* at 856. The court discussed *Government Personnel Mut. Life Ins. Co. v. Wear*, 247 S.W.2d 284 (Tex. Civ. App.—San Antonio), *modified on other grounds*, 151 Tex. 454, 251 S.W.2d 525 (1952), which read several contracts together in order to understand the entire transaction. 610 S.W.2d at 857. Furthermore, the court quoted *Lawrence v. United States*, 378 F.2d 452, 461 (5th Cir. 1967), which stated: "Thus, while recognizing that two or more separate agreements executed contemporaneously are to be construed together, perhaps even as one instrument, this does not mean that all are bodily consolidated into one instrument so that every provision in one instrument thereby becomes a part of every other instrument." 610 S.W.2d at 857.

28. 610 S.W.2d at 857.

29. 619 S.W.2d 422, 425 (Tex. Civ. App.—Texarkana 1981, no writ).

30. A skilled care nursing home is required to have a license and approval from the

that referred to the licensing requirement and stated that the lessor must bear the expense of any alterations or repairs required for licensing.³¹ The lessee contended that the lease created an affirmative duty upon the lessor to make the necessary repairs. The court of appeals disagreed, stating that there was a difference between a covenant to make repairs and a covenant to pay for repairs.³² The lessee also contended the lessor was estopped from avoiding the duty to make repairs because the landlord had voluntarily undertaken to make repairs. Again, the court disagreed, holding that the voluntary making of repairs did not constitute an admission or evidence of a duty to make the repairs.³³ Moreover, the court found that the making of repairs did not create a new agreement to make repairs.³⁴ In addition, there was no allegation or evidence of detrimental reliance, an essential element of estoppel; the court of appeals, therefore, found a clear distinction between the obligation to pay for repairs and the obligation to make repairs.³⁵

D. Forfeiture

The Texas Supreme Court reversed a forfeiture under a lease in *Pitman v. Sanditen*.³⁶ In *Pitman* the tenant purchased the buildings, equipment, improvements, and personal property of a Laredo hotel and leased the underlying real estate. The lease agreement contained an option to purchase. After extensive renovation of the hotel, the tenant exercised his option to buy the property. The agreement provided, "a contract shall exist between lessor and lessee for the sale and purchase of the Real Estate" when the option was exercised.³⁷ The parties agreed to close by mail making March 1 the closing date. The transaction was not closed on March 1; consequently, the landlord refused to close unless he received the rental payment due on March 1. Upon the tenant's refusal to pay the March rent, the landlord terminated the lease according to the lease provisions that allowed termination for nonpayment of rent.

The landlord sued seeking a declaratory judgment that the lease was terminated and that the tenant thereby forfeited his interest in the leasehold and the improvements. The tenant counterclaimed for specific performance of his option. The trial court and court of civil appeals determined that the lease was terminated, and that the tenant had forfeited his interest.³⁸ The supreme court, reversing, held that the lease termina-

State Department of Health. See TEX. REV. CIV. STAT. ANN. art. 4442c (Vernon 1976 & Supp. 1982).

31. 619 S.W.2d at 424. The provision made licensing a contingency of the lease, allowed the lessor to seek the license if the lessee failed, and provided a formula by which to reduce the rent if the license ultimately permitted less than 70 beds. *Id.*

32. *Id.*

33. *Id.* at 425.

34. *Id.*

35. *Id.*

36. 626 S.W.2d 496, 498 (Tex. 1982).

37. *Id.* at 496-97.

38. *Pitman v. Sanditen*, 611 S.W.2d 663, 668 (Tex. Civ. App.—San Antonio 1980).

tion and forfeiture provisions did not apply because the landlord tenant relationship ceased upon the exercising of the option.³⁹ Finding that the lease provisions for forfeiture did not apply to the vendor purchaser relationship created by the exercise of the option, the court, therefore, granted specific performance of the option.⁴⁰

E. Assignment of Rent

In *Citizens Bank & Trust Co. v. Wy-Tex Livestock Co.*⁴¹ a landlord assigned the right to receive rents from its tenant to a bank in consideration for a loan. The bank notified the tenant of the assignment and, thereafter, the tenant made rental payments to the bank. Subsequently, a garnishing creditor of the landlord filed suit to obtain the rentals claiming that the assignment was a security interest, and that the bank as assignee was required, under the Business and Commerce Code, to file a financing statement in order to perfect its interest.⁴² The court of appeals held that the assignment was absolute, and that the assignee was not required to file a financing statement under section 9 of the Business and Commerce Code because section 9 did not apply to rents payable under a real property lease.⁴³

F. Venue

In *Friday v. Grant Plaza Huntsville Associates*⁴⁴ the Texas Supreme Court considered the proper venue site for a lessor to bring suit against two guarantors of a lessee for unpaid rent under a written lease agreement. The lessor brought suit in the county where the property was located, and the lessee and guarantors filed pleas of privilege to be sued in the county of their residence. The trial court denied their pleas, and the court of appeals affirmed.⁴⁵ In addition, the court of appeals held that the guarantors were necessary parties.⁴⁶ Only the guarantors appealed the court of appeals' decision; therefore, the supreme court decision does not address venue as to the lessee. The supreme court reversed as to the guarantors, holding that because the written lease agreement and the guaranty did not contain a location for payment of the rent, the proper venue was the residence of the guarantors.⁴⁷ Further, the court held that the guarantors were not necessary parties.⁴⁸

39. 626 S.W.2d at 498.

40. *Id.*

41. 611 S.W.2d 168 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.).

42. See TEX. BUS. & COM. CODE ANN. §§ 9.102(b), 9.401(a)(3) (Vernon Supp. 1982).

43. 611 S.W.2d at 171. See TEX. BUS. & COM. CODE ANN. § 9.104(10) (Vernon Supp. 1982); *In re Bristol Assoc., Inc.*, 505 F.2d 1056 (3d Cir. 1974) (assignment of rents under a lease excluded from operation of article 9 of U.C.C.).

44. 610 S.W.2d 747 (Tex. 1980).

45. *Id.* at 748.

46. *Id.*

47. *Id.* at 749. The court held that TEX. REV. CIV. STAT. ANN. art. 1995, § 5(a) (Vernon Supp. 1982), fixing venue in county named in contract, did not apply. 610 S.W.2d at 749.

48. 610 S.W.2d at 749-50. The court held that TEX. REV. CIV. STAT. ANN. art. 1995,

G. Exculpatory Clauses

The Austin court of civil appeals addressed the validity of an exculpatory clause in *Porter v. Lumbermen's Investment Corp.*⁴⁹ In *Porter* a tenant brought an action against his landlord for injuries he sustained by falling through a plate glass door.⁵⁰ The lease, which was in writing, contained an exculpatory clause absolving the landlord of any liability for injury to the lessee.⁵¹ Based on the landlord's affirmative defense of the exculpatory clause, the trial court granted summary judgment for the landlord. The tenant appealed, alleging that the exculpatory clause was invalid as an adhesion contract and, citing to the decision of *Kamarath v. Bennett*⁵² that recognized the warranty of habitability, that the clause was against public policy. The court of civil appeals affirmed the trial court's summary judgment, stating that clauses exculpating a landlord from future negligence liability were generally upheld.⁵³ Further, the court stated that such clauses were invalid when there is a gross disparity of bargaining power, but not when, as here, the tenant failed to plead and offer proof of any gross disparity of bargaining power.⁵⁴ In addition, the court noted that the warranty of habitability did not apply to a personal injury case involving a landlord and tenant; rather, the cause of action must arise from some theory of negligence.⁵⁵

H. Security Deposits

In *A. B. Investment Corp. v. Dorman*⁵⁶ a tenant sued his landlord for

§ 29a (Vernon 1964), fixing venue against all necessary parties where proper against any defendant, did not apply because relief was obtainable without the joinder of the guarantors. 610 S.W.2d at 749-50.

49. 606 S.W.2d 715 (Tex. Civ. App.—Austin 1980, no writ).

50. *Id.* at 716. The tenant in *Porter* was a member of a law firm that was the lessee under the lease. The fact that the tenant was a lawyer may have had some bearing on the court's decision involving disparity in bargaining position.

51. The exculpatory clause provided:

12. NON-LIABILITY OF LESSOR: Neither Lessor, its agents, employees and/or servants shall be liable for any damage or injury to Lessee, its agents, employees, servants, guests and/or licensee's [sic] or to any person entering the premises or the building of which the demised premises are a part or to goods or chattels therein which result from any defect in the structure or the equipment of which the demised premises are a part, nor shall Lessor or its agents, employees, or servants be liable for any damage caused to Lessee, its agents, employees, servants, guests and/or licensee's [sic], by other Lessees or persons in said building or for interference with light or other incorporeal hereditaments, or caused by operations in construction of any public or quasi-public work, nor for any latent defect in the building.

Id.

52. 568 S.W.2d 658 (Tex. 1978).

53. 606 S.W.2d at 717.

54. *Id.*

55. *Id.* See generally Katz, *Real Property—Landlord & Tenant, Annual Survey of Texas Law*, 33 Sw. L.J. 85, 95 (1979); McSwain & Butler, *The Landlord's Statutory Duty to Repair—Article 5236f: The Legislative Response to Kamarath v. Bennett*, 32 BAYLOR L. REV. 1, 4 (1980); Comment, *Recent Statutory Developments in Texas Landlord-Tenant Law: A Sword Without a Shield*, 35 Sw. L.J. 645 (1981).

56. 604 S.W.2d 506 (Tex. Civ. App.—Dallas 1980, no writ).

failing to return his security deposit within thirty days as prescribed by article 5236e.⁵⁷ In order for the retention of a security deposit to constitute a violation of the statute the court must find "bad faith" on the part of the landlord.⁵⁸ The trial court found that the landlord had acted in bad faith in not returning the deposit within the statutory period because the landlord had not developed a method by which to expediently return security deposits. The court awarded damages to the tenant in the amount of triple his deposit plus \$100.00 and attorney's fees.

The court of civil appeals reversed and remanded the decision of the trial court, concluding that the trial judge erred in finding bad faith.⁵⁹ In discussing the meaning of bad faith, the court noted its decision in *Wilson v. O'Conner*⁶⁰ that had found "that 'bad faith' implies an intention to deprive the tenant of the refund lawfully due."⁶¹ Further, the court noted, intentional retention alone would not establish bad faith even though the burden was on the landlord to overcome the presumption of bad faith.⁶² The court concluded that as a matter of law, the failure to have a system to timely return the deposits was not bad faith, and that the trial judge had failed to reach the issue of bad faith.⁶³ The court, therefore, remanded the case to the trial court.⁶⁴

I. Landlord's Lien

A tenant brought suit against a landlord for willfully excluding the tenant from her apartment,⁶⁵ for seizing exempt property under a landlord's lien,⁶⁶ and for misrepresenting the landlord's rights⁶⁷ in *Causey v. Catlett*.⁶⁸ The court of civil appeals affirmed the trial court's decision in favor of the landlord with respect to the wrongful exclusion and misrepresentation, but reversed and remanded on the point of seizure of exempt property.⁶⁹ The landlord had locked out the tenant and seized a deep freeze under his landlord's lien because of the nonpayment of rent. The landlord contended the deep freeze was not exempt under article 5236d, § 2 as "kitchen furniture and utensils" because the exemption applied only to necessary kitchen items and not to luxury items such as a deep freeze.⁷⁰

57. TEX. REV. CIV. STAT. ANN. art. 5236e (Vernon Supp. 1982).

58. Section 4(a) of article 5236e provides:

A landlord who in bad faith retains a security deposit in violation of this Act is liable for \$100 plus treble the amount of that portion of the deposit which was wrongfully withheld from the tenant, and shall be liable for reasonable attorneys fees in a law suit to recover the security deposit.

59. 604 S.W.2d at 508.

60. 555 S.W.2d 776 (Tex. Civ. App.—Dallas 1977, writ dismissed).

61. 604 S.W.2d at 508 (citing 555 S.W.2d at 780).

62. 604 S.W.2d at 508.

63. *Id.*

64. *Id.*

65. See TEX. REV. CIV. STAT. ANN. art. 5236c, § 2 (Vernon Supp. 1982).

66. *Id.* art. 5236d.

67. See TEX. BUS. & COM. CODE ANN. § 17.46(b)(12) (Vernon Supp. 1982).

68. 605 S.W.2d 719 (Tex. Civ. App.—Dallas 1980, no writ).

69. *Id.* at 719.

70. *Id.* at 720; TEX. REV. CIV. STAT. ANN. art. 5236d, § 2 (Vernon Supp. 1982).

The court held that as a matter of law the deep freeze was exempt property as kitchen furniture and utensils because the statute did not contain any limitation as to value or use of item.⁷¹ The court, therefore, held that the landlord had violated the statute by seizing the deep freeze.⁷² Furthermore, the court held that the statute did not require knowledge on the part of the landlord that the seizure was unlawful.⁷³

J. Remedies and Damages

The Houston [14th District] court of civil appeals considered whether a landlord's "Notice to Quit" letter constituted a forfeiture of its rights under the lease in *Crain v. Southern Warehouse Corp.*⁷⁴ Upon the tenant's failure to pay rent, the landlord sent a letter to the tenant, entitled "Notice to Quit," that instructed the tenant to pay overdue rent within three days or surrender possession of the premises. The tenant moved out. Nearly two years later, after being unable to relet the premises, the landlord brought suit to recover accrued rent to the date of suit. The tenant contended that the landlord had elected its remedy and forfeited its rights under the lease by its Notice to Quit letter. The court, however, held that the letter did not declare the lease forfeited as did the letter in *Rohrt v. Kelly Manufacturing Co.*⁷⁵ Furthermore, the lease in *Crain* contained a clause that expressly allowed the landlord to pursue any remedy without forfeiture or waiver of any rent due.⁷⁶ The court, therefore, affirmed the trial court's decision granting the accrued rental to the landlord.⁷⁷ The tenant also questioned the measure of damages, alleging that it should have been the difference between the present value of the rentals contracted for and the reasonable cash market value of the lease for the unexpired term. The court disagreed holding that the tenant's measure of damages would be proper if the landlord had sued for anticipatory breach and had not relet.⁷⁸ The proper measure of damages was found to be the entire contractual amount because the landlord had attempted to relet the premises, and a lease agreement clause specifically allowed the landlord to recover all loss and damage caused by the termination of the lease.⁷⁹

71. 605 S.W.2d at 720.

72. *Id.*

73. *Id.*

74. 612 S.W.2d 283 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

75. *Id.* at 285. See *Rohrt v. Kelly Mfg. Co.*, 162 Tex. 534, 349 S.W.2d 95, 97 (1961). (landlord's letter specifically stated that the lease was forfeited).

76. 612 S.W.2d at 285. The court in *Rohrt* noted that a lease may expressly allow reentry by the lessor without affecting the obligations for the unexpired term. 162 Tex. at 538, 349 S.W.2d at 98. The lease in *Crain* provided, "nor shall pursuit of any remedy herein provided constitute a forfeiture or waiver of any rent due to landlord hereunder" 612 S.W.2d at 285.

77. 612 S.W.2d at 285.

78. *Id.*

79. *Id.* The lease provided:

[Landlord may] terminate this Lease, in which event Tenant shall immediately surrender the premises to the Landlord . . . and Tenant agrees to pay the Landlord on demand the amount of all loss and damage which Landlord may

The Texas Supreme Court addressed the liability of the State Commission for the Blind under a written lease as a holdover tenant in *State v. City National Bank*.⁸⁰ The Commission occupied space owned by the bank under a written lease agreement. At the end of the term, the Commission, unable to find space elsewhere, remained in possession for an additional thirteen months without paying rent. The bank sued the Commission for a money judgment for the holdover. The trial court granted judgment for the bank and the court of civil appeals affirmed.⁸¹ Holding that under the terms of the contract the bank was entitled to recover the reasonable rental value for the holdover period, the supreme court affirmed.⁸² The court relied on the terms of the lease that provided for delivery of possession upon termination or default and remedies for recovery of rent and damages.⁸³ By finding the Commission liable under the written lease, the court avoided discussing state laws that might limit the liability of the Commission.⁸⁴

K. Legislation

The 67th Texas Legislature passed several laws affecting landlord and tenant relations.⁸⁵ A landlord's lien is provided for the lessor of a self-storage facility on all the property stored in the facility for payment of

suffer by reason of such termination, whether through inability to relet the premises on satisfactory terms or otherwise.

Id.

80. 603 S.W.2d 764 (Tex. 1980).

81. *State v. City Nat'l Bank*, 578 S.W.2d 155, 162 (Tex. Civ. App.—Tyler 1979).

82. 603 S.W.2d at 765.

83. *Id.* The lease agreement provided:

[O]n termination of this lease . . . lessee shall deliver up the premises. . . . In the event lessee shall be in default in the payment of rentals . . . or shall otherwise breach its covenants or obligations and shall be and remain in default for a period of 30 days after notice from lessor to it of such default, lessor shall have the right and privilege of terminating the lease . . . and of entering upon and taking possession . . . and shall have the remedies now or hereafter provided by law for recovery of rent, repossession of the premises and damages occasioned by such default. . . . Lessee shall have the remedies now or hereafter provided by law for recovery of rent, . . . and damages occasioned by such default.

Id.

84. *Id.* at 766. The State contended that:

(1) The bank's claim arises from a transaction which is not provided for by pre-existing law as required by Article III, Section 44 of the Texas Constitution; (2) Article 666b,¹ prohibits the State Commission for the Blind from contracting with the Bank to pay rental for the holdover period; and (3) this Article prevents the State from being liable on an implied contract or quantum meruit.

1. Article 666b was repealed by Acts of the 66th Legislature, 1979. The leasing of building space is now covered by Article 601b, Section 6.01. This section allows leasing by negotiation under some circumstances with the consent of the Agency.

Id. at 766 and n.1.

85. This section is intended to describe the topics of recent legislative acts only briefly. For a more detailed review, see Stover, *Real Estate, Probate & Trust Law*, 20 STATE BAR NEWSLETTER 8 (1981).

overdue rent and charges by section 4 of article 5238b.⁸⁶ In addition, if there is a written contractual agreement between the lessor and lessee that includes a clause that is underlined or printed in conspicuous bold print providing for a landlord's lien and if the landlord complies with the other notice requirements, the landlord may seize and sell the property without judicial foreclosure.⁸⁷ Article 5236h requires a landlord of a residential dwelling unit to install, change, or rekey a security device after written request by the tenant.⁸⁸ Another new statute, article 5236i, requires a landlord to disclose the name and address of the owner of the dwelling unit and of any property management company that manages the unit to the tenant upon request.⁸⁹ Article 5236g allows a landlord to terminate a written or oral lease entered into or renewed after June 15, 1981, if the tenant uses the premises for an activity that is indecent and the tenant is so convicted under chapter 43 of the Penal Code.⁹⁰ Lastly, the legislature passed article 5236j that requires a landlord to install a smoke detector outside of each bedroom in all dwelling units constructed after September 1, 1981, and to install by September 1, 1984, at least one smoke detector in all dwelling units constructed before September 1, 1981.⁹¹

II. MECHANICS' AND MATERIALMEN'S LIENS

A. Statutory Lien

The Fifth Circuit Court of Appeals considered an appeal by an industry owner and a corporate surety from a district court decision granting recovery for two subcontractors based on mechanics' and materialmen's liens and upon the surety's bond in *Thermo Tech, Inc. v. Goodyear Tire & Rubber Co.*⁹² In reversing the district court's decision, the court of appeals found that the district court had erred in finding a lien in favor of one of the subcontractors because the subcontractor had not filed a lien affidavit within the statutory period prescribed by articles 5453 and 5469.⁹³ The subcontractor sought to extend the date for filing by arguing that the owner had failed to retain for its benefit ten percent of all of the funds due to all of the contractors on the project.⁹⁴ Disagreeing, the court determined that the contractor's contention was incorrect because after the Texas

86. TEX. REV. CIV. STAT. ANN. art. 5238b, § 4 (Vernon Supp. 1982).

87. *Id.* § 5(b).

88. *Id.* art. 5236h.

89. *Id.* art. 5236i.

90. *Id.* art. 5236g. See TEX. PENAL CODE ANN. §§ 43.01-.24 (Vernon 1968 & Supp. 1982) (prohibition against various crimes relating to prostitution and obscenity).

91. TEX. REV. CIV. STAT. ANN. art. 5236j (Vernon Supp. 1982).

92. 643 F.2d 1173 (5th Cir. 1981).

93. *Id.* at 1177-79; see TEX. REV. CIV. STAT. ANN. arts. 5453, 5469 (Vernon Supp. 1982). Article 5453 provides that a lien affidavit must be filed not later than 90 days after the tenth day of the next month after the materials are delivered. Article 5469 provides that the lien affidavit must be filed within 30 days after the work by the contractor is completed.

94. 643 F.2d at 1178. See TEX. REV. CIV. STAT. ANN. art. 5469 (Vernon Supp. 1982), which requires the owner to retain 10% of the contract price until 30 days after the completion of the work.

Supreme Court's decision in *Hayek v. Western Steel Co.*⁹⁵ the legislature amended the statute to clearly provide that the owner's duty to retain funds for the subcontractors was calculated with respect to the individual contractor through which the subcontractor claims.⁹⁶ In addition, the court found, as had the trial court, that the other subcontractor had not filed his lien affidavit within the statutory period.⁹⁷ The subcontractor argued, however, that the date for filing was extended beyond that found by the court because he had supplied scaffolding which was used to a later date and he thus had supplied materials until that later date.⁹⁸ The court found, however, that the date of supplying materials was unimportant for article 5469 purposes.⁹⁹ In addition, the court found that the contractor had not complied with article 5463 that requires notice to be sent periodically when the materials are supplied over a period of time.¹⁰⁰ The court of appeals also reversed the district court's finding that the owner and surety were liable because they were estopped from denying there was a "payment" bond.¹⁰¹ The owner had in fact purchased a "performance" bond that would pay subcontractors only in the event they had perfected a valid lien. Since a purchase order from the owner to the contractor required the contractor to get a "payment and performance bond," the district court formulated its estoppel theory on the basis that the purchase order was an implicit representation to the subcontractor that such a bond existed.¹⁰² The court of appeals found that estoppel did not apply because the subcontractor had not met his duty to reasonably inquire into the existence of the bond.¹⁰³ The court, therefore, found that the subcontractor could recover only as a general creditor against the funds retained by the owner.¹⁰⁴

95. 478 S.W.2d 786 (Tex. 1972) (holding that the owner was required to retain 10% of all the funds due to all contractors).

96. 643 F.2d at 1178. See TEX. REV. CIV. STAT. ANN. art. 5452(2)(d) (Vernon Supp. 1982); *McKalip v. Smith Bldg. & Masonry Supply, Inc.*, 599 S.W.2d 884 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.) (amendment of art. 5452 limits retainage funds to 10% of particular original contract). See generally Note, *Duty of Owners Without General Contractors to Establish Mechanics' and Materialmen's Lien Retainage Funds in Texas*, 11 HOUS. L. REV. 185 (1973).

97. 643 F.2d at 1178.

98. *Id.* See TEX. REV. CIV. STAT. ANN. art. 5452(2)(b)(2) (Vernon Supp. 1982) (including use of construction equipment in definition of "material").

99. 643 F.2d at 1178-79.

100. *Id.* at 1179. See TEX. REV. CIV. STAT. ANN. arts. 5463, 5453(2) (Vernon Supp. 1982). See generally Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 SW. L.J. 665, 676-87 (1972).

101. 643 F.2d at 1179-80.

102. *Id.* at 1179.

103. *Id.* at 1179-80. The court distinguished the present case from those estoppel cases in which a party has no duty to inquire into the representation. *Id.* at 1180. See *Cooper Petro. Co. v. LaGloria Oil & Gas Co.*, 436 S.W.2d 889, 894 (Tex. 1969) (when vice president induced extension of credit by promising president's guaranty, president estopped to deny); *Traylor v. Gray*, 547 S.W.2d 644, 653 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) (when no facts made it reasonable for seller to investigate into promise of third party that buyer would honor contract, buyer estopped to assert otherwise).

104. 643 F.2d at 1181.

In *Reliable Life Insurance Co. v. Brown & Root, Inc.*¹⁰⁵ Brown & Root, as contractor, brought suit against Houston Leisure Park Company, as owner, for labor and materials expended in the construction of a recreational vehicle camp and for foreclosure of its liens against the property. Brown & Root also sued Reliable Life Insurance Company in order to establish the priority of Brown & Root's lien.¹⁰⁶ Affirming the trial court's decision in favor of Brown & Root, the court of civil appeals found that there was sufficient evidence to support the jury finding of substantial performance of the contract.¹⁰⁷ In addition, the court determined that the lien affidavit had been filed within the requisite 120-day period.¹⁰⁸ Reaching this decision necessitated that the court determine when the 120-day period began to run. The court, therefore, set out the four alternative events that might trigger the running of the period.¹⁰⁹ Although stating that a breach by the owner could be such an event, the court determined that the contractor, after the owner's breach, could continue the work until completion and the completion date would be the date when the accrual of the indebtedness arose.¹¹⁰ The court found that allowing the completion date rather than the date of the breach to control was consistent with the principle that the lien statutes should be liberally construed to protect the contractor.¹¹¹ In determining the priority of Brown & Root's lien over that of Reliable Life Insurance Company, the court discussed commencement of construction in light of the Texas Supreme Court's decision in *Diversified Mortgage Investors v. Lloyd D. Blaylock, General Contractor, Inc.*¹¹² and equitable subrogation.¹¹³ The court determined that under *Blaylock*, the clearing of the land by Brown & Root was commencement of construction and constituted the inception of the mechanic's lien as a matter of law.¹¹⁴ As to Reliable's claim of equitable subrogation, the court determined that

105. 607 S.W.2d 621 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.).

106. Reliable had a deed of trust lien on the property. *Id.* at 624.

107. *Id.* at 627. The text of the case contains a lengthy recitation of Brown & Root's performance. *Id.* at 625-29.

108. *Id.* at 627-28. See TEX. REV. CIV. STAT. ANN. art. 5453 (Vernon Supp. 1982) (lien affidavit required to be filed within 120 days of the accrual of the indebtedness).

109. 607 S.W.2d at 627. The four events were the following: "(1) breach by the owner, (2) abandonment by the contractor, (3) completion of the project, or (4) final settlement." See TEX. REV. CIV. STAT. ANN. art. 5467 (Vernon Supp. 1982).

110. 607 S.W.2d at 627.

111. *Id.*

112. 56 S.W.2d 94 (Tex. 1978). The court stated:

The Supreme Court held in *Blaylock* that under the "commencement of construction" requirement of Art. 5459, the inception of a Mechanic's and Materialman's lien occurs when the "activity commenced" is actually conducted on the land, is visible on the land, and when it constitutes an activity that is either defined as an "improvement" under the Texas statute or involves the excavation for or laying of a foundation for a building. The word "improvement" specifically includes the "clearing, grubbing . . . of land," Art. 5452; and so the Supreme Court held in *Blaylock* that such activity was sufficient to constitute inception of the mechanic's lien.

607 S.W.2d at 627.

113. 607 S.W.2d at 628-31.

114. *Id.* at 629.

the implied findings made by the trial court were sufficient to support the conclusion that Reliable did not have a prior lien by equitable subrogation.¹¹⁵ Lastly, the court determined that any question as to the amount of recovery above the contract price by Brown & Root was waived because of the failure to raise any objection to the evidence of damage submitted by Brown & Root.¹¹⁶

In *First National Bank v. Sledge*¹¹⁷ the owner of two lots originally contracted with Harris to build a house on each. The owner executed two mechanic's and materialman's lien contracts and notes that Harris subsequently assigned, without indorsement, to the bank, and the bank recorded the assignment. Thereafter, the contractor completed one house but abandoned work on the other, filed for bankruptcy, and received a discharge. Sledge and each of the other subcontractors of Harris who had worked on or provided materials for the construction filed a "Statement Securing Mechanic's and Materialman's Lien Against Owner" in the county mechanic's and materialman's lien records, and each sent one copy of his affidavit to the owner. The bank sued the subcontractors and the owner to have the liens removed or declared inferior. The subcontractors cross-claimed for establishment of their statutory liens, foreclosure, and for attorney's fees, costs and interest. Upon a motion, the court discharged the liens after receiving into its registry twice the amount of the claims from the owner and the bank. The court then granted summary judgment against the owner. The court of civil appeals reversed in an unpublished opinion.¹¹⁸ Thereafter, a trial was held on the merits, and judgment was granted for the subcontractors.¹¹⁹ On appeal, the bank and the owner contended that the subcontractors had not complied with the statutory requirements for perfecting their liens. The court concluded that the subcontractors had complied with the requirements¹²⁰ despite the fact that they had each sent only one copy of the lien affidavits to the owner,¹²¹ the

115. *Id.* at 631. Reliable attempted to prove that it had a first lien by tracing its lien to a deed of trust held by Texas First Mortgage REIT and to a vendor's lien retained in the deed of the property. The doctrine of equitable subrogation allows a lender to be subrogated to a prior lien if the funds it loans are used to pay off the debt secured by the prior lien. *See Providence Inst. for Sav. v. Sims*, 441 S.W.2d 516 (Tex. 1969) (holder of second deed of trust who advanced loan proceeds to holder of first deed found subrogated to lien of holder of first deed).

116. 607 S.W.2d at 631.

117. 616 S.W.2d 954 (Tex. Civ. App.—Fort Worth 1981, writ granted).

118. *Id.* at 956.

119. *Id.* at 956-57. The amounts awarded were to come from the money placed in the court's registry rather than foreclosure of any liens.

120. *Id.* at 957. The Hardeman Act provides protection for subcontractors by requiring the owner to withhold funds due to the contractor after the subcontractor files a lien affidavit and notifies the owner, and, further, the owner is required to withhold 10% of the contract price or value of the work. *Id.* *See* TEX. REV. CIV. STAT. ANN. arts. 5453, 5463, 5469 (Vernon Supp. 1982).

121. 616 S.W.2d at 957. The statute requires that two copies be sent. TEX. REV. CIV. STAT. ANN. art. 5453(1) (Vernon Supp. 1982). The court, however, found one copy to be sufficient because the owner actually received it and was not prejudiced in any way. 616 S.W.2d at 957 (quoting *Hunt Developers, Inc. v. Western Steel Co.*, 409 S.W.2d 443, 449 (Tex. Civ. App.—Corpus Christi 1966, no writ) which stated: "The Legislature did not in-

affidavits were sent by ordinary mail,¹²² and the invoices were not attached.¹²³ The owner and bank also contended that the liens were inferior to the bank's liens. Distinguishing *Sledge* from those involving a holder in due course,¹²⁴ the court concluded that because the notes and liens were assigned rather than negotiated by endorsement and because the owner had no notice of the assignment, the subcontractors could perfect their liens.¹²⁵ The court, therefore, affirmed the decision of the trial court.¹²⁶ The Texas Supreme Court has granted writ in *Sledge*,¹²⁷ and that decision will be reported in next year's *Survey*.

B. Constitutional Lien

The case of *San Antonio Bank & Trust Co. v. Anel, Inc.*¹²⁸ involved the issue of whether a contractor had waived its constitutional lien.¹²⁹ In *Anel* a bank provided interim construction financing for a condominium project. Upon the failure of the owner to pay the contractor for work performed, the contractor and the bank entered into a written agreement providing that if the bank took over the property by foreclosure, the contractor would receive an approximately four percent ownership interest in the property for completing the work. Work progressed but the owner eventually refused to approve the contractor's last draw request and the owner thereafter declared bankruptcy. Consequently, the bank foreclosed its liens and purchased the property at the trustee's sale.¹³⁰ The contractor sued the bank, claiming a constitutional mechanic's and materialman's lien on the property. The trial court, finding for the contractor, ordered the lien foreclosed and property sold. The bank appealed, asserting that the contractor had waived its constitutional lien when it entered into the participation agreement with the bank.¹³¹ The court of civil appeals con-

tend that the materialman should loose his lien through the technicalities of a warning, where the owner was not misled to his prejudice.").

122. 616 S.W.2d at 957. When the notice is actually received, the method of delivery is immaterial. See TEX. REV. CIV. STAT. ANN. art. 5456(2) (Vernon Supp. 1982).

123. 616 S.W.2d at 958. Article 5455 requires only a general statement of the nature of the invoices while article 5453(2) requires a specific statement. See TEX. REV. CIV. STAT. ANN. arts. 5453, 5455 (Vernon Supp. 1982).

124. 616 S.W.2d at 958. The bank and owner were relying on case law such as *McCutch-
eon v. Union Mercantile Co.*, 267 S.W.2d 916 (Tex. Civ. App.—el Paso 1954, writ ref'd) that provided that a subcontractor could not fix a lien after an original contractor had negotiated the notes and liens to a holder in due course because the owner no longer owed the contractor, and a subcontractor could only have a lien claim through his contractor. 616 S.W.2d at 958.

125. 616 S.W.2d at 958-59.

126. *Id.* at 959.

127. 25 Tex. Sup. Ct. J. 115 (January 6, 1982).

128. 613 S.W.2d 55 (Tex. Civ. App.—Texarkana 1981, writ ref'd n.r.e.).

129. TEX. CONST. art. XVI, § 37 provides that mechanics, artisans, and materialmen shall have a lien on the building or materials made by their labors or with their materials for the value of their labor or materials.

130. 613 S.W.2d at 57. The bankruptcy court abandoned the project because no equity existed for the unsecured creditors; thus, the bank was allowed to foreclose. *Id.*

131. *Id.* See *Shirley-Self Motor Co. v. Simpson*, 195 S.W.2d 951 (Tex. Civ. App.—Fort Worth 1946, no writ) (recognizing rule that constitutional lien may be waived by inconsis-

cluded that the contractor's not attempting to perfect his statutory liens and entering into the participation agreement was inconsistent with his subsequent claim of a constitutional lien.¹³² Further, the court found that even though the constitutional lien was not expressly waived, the contractor's agreement constituted an election of remedies.¹³³ The court, therefore, concluded that the contractor had waived its constitutional lien.¹³⁴

The court of civil appeals also considered a subcontractor's claim of a constitutional lien in *Contract Sales Co. v. Skaggs*.¹³⁵ In *Skaggs* the subcontractor agreed to install floor covering in a house owned by the contractor. The contractor sold the house around the same time the work was done. When the contractor refused to pay for the flooring the subcontractor sued him for payment and sued the new owner to foreclose the statutory and constitutional mechanic's and materialman's lien. The court of civil appeals held that the subcontractor had a valid constitutional lien because the contractor was the owner at the time the subcontractor commenced the work, the work was actually done, the money was owed,¹³⁶ and the new owner had not pled that he was a bona fide purchaser.¹³⁷

tent action); *Nystel v. Gully*, 257 S.W. 286 (Tex. Civ. App.—Austin 1923, no writ) (lienholder's agreement to allow owner to sell property held to be waiver of lien); *DeBruin v. Santo Domingo Land & Irrigation Co.*, 194 S.W. 654 (Tex. Civ. App.—San Antonio 1917, writ ref'd) (filing of chattel mortgage instead of perfecting constitutional mechanic's lien amounted to waiver of lien). *But see Jones v. White*, 72 Tex. 316, 12 S.W. 179 (1888) (without express agreement acceptance of drafts did not waive lien); *Dillard v. McGinty*, 17 S.W.2d 167 (Tex. Civ. App.—Amarillo 1928, no writ) (intent to waive must be clear); *Jines v. Dodson*, 279 S.W. 557 (Tex. Civ. App.—Amarillo 1926, writ ref'd) (lien not waived by taking additional security). *See generally* 36 TEX. JUR. 2D *Liens* § 24 (1962).

132. 613 S.W.2d at 58-59. The court quoted *Nystel v. Gully*, 257 S.W. 286 (Tex. Civ. App.—Austin 1923, no writ):

We are therefore of the opinion that the rule of law announced by numerous authorities, which held that where one enters into a contract, the complete performance of which, according to its true intent and terms, is inconsistent with the existence of a lien given by law, he thereby foregoes and waives the lien which the law would otherwise give him, is a correct one and applies in this case.

Id. at 288.

133. 613 S.W.2d at 58.

134. *Id.*

135. 612 S.W.2d 652 (Tex. Civ. App.—Dallas 1981, no writ).

136. *Id.* at 653-54. The court stated that, "a constitutional mechanic's lien is self-executing as between the contractor and the owner and is enforceable against the owner whether or not there be notice to the owner or compliance with any statutory requisite." *Id.*

137. *Id.* at 653. The court noted that a constitutional lien may not be enforced against a bona fide purchaser who has no notice of the lien. *Id.* *See Irving Lumber Co. v. Alltex Mortgage Co.*, 446 S.W.2d 64 (Tex. Civ. App.—Dallas 1969), *aff'd*, 468 S.W.2d 341 (Tex. 1971) (builder's constitutional mechanic's lien held inferior to lien of mortgagee who had no notice); *Continental Radio Co. v. Continental Bank & Trust Co.*, 369 S.W.2d 359 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.) (lien of mortgagee without notice of prior constitutional artisan's lien held superior); *Black, Sivalls & Bryson, Inc. v. Operators' Oil & Gas Co.*, 37 S.W.2d 313 (Tex. Civ. App.—Eastland 1931, writ dism'd) (when constitutional lien not filed and no actual notice, subsequent purchaser not bound by lien). Furthermore, the bona fide purchaser status is an affirmative defense and must be supported by pleading and proof. 612 S.W.2d at 653. *See Valley Ready-Mix Concrete Co. v. Valley State Bank*, 227 S.W.2d 231 (Tex. Civ. App.—San Antonio 1950, no writ) (contractor's allegation that bank claim inferior not sufficient to raise bank's defense of bona fide purchaser); *Kurz v. Soliz*, 231 S.W. 424 (Tex. Civ. App.—San Antonio 1921, no writ) (although purchaser could prove inno-

Finding a valid constitutional lien, the court did not address the statutory lien.¹³⁸

C. Whirlpool Doctrine

The Texas Supreme Court reversed the court of civil appeals decision in *Exchange Savings & Loan Association v. Monocrete Pty. Ltd.*¹³⁹ that was reported in last year's *Survey* article.¹⁴⁰ In *Monocrete* a roofing company provided and installed concrete roofing tiles on several condominiums. Thereafter, the company properly perfected a Hardeman Act mechanic's and materialman's lien.¹⁴¹ The holder of the prior deed of trust lien foreclosed and purchased the condominium development at the trustee's sale. At the trial level, the court held that the roof tiles could not be removed without material injury. The mechanic's and materialman's lien, being inferior to the deed of trust, was therefore extinguished. The court of civil appeals reversed, holding that the tiles could be removed without material injury and, applying an "economic benefit" test, found that the materialman could benefit from the removal.¹⁴² Under the court's economic benefit test, if the materialman could remove the tiles and gain an economic benefit and there was no other evidence of material injury, the removal would be allowed.¹⁴³ Citing to its decision in *First National Bank v. Whirlpool*,¹⁴⁴ the Texas Supreme Court stated that a materialman's lien would be superior to a prior recorded deed of trust if the materials "can be removed without material injury to (1) the land, (2) the pre-existing improvements, or (3) the materials themselves."¹⁴⁵ The court determined that the proper inquiry should be whether removal caused a material injury to existing structure or roof tiles.¹⁴⁶ Furthermore, the court stated that the effect of removal upon the prior lien's security was pertinent to a decision allowing removal.¹⁴⁷ In addition, the court listed several factors that could be considered in reaching a decision.¹⁴⁸ Ultimately, the court held

cence of prior lien, failure to plead such issue precluded that defense). The court also indicated that the purchaser had actual knowledge of the work performed by the subcontractor. 612 S.W.2d at 653 (citing *Inman v. Clark*, 485 S.W.2d 372 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ) (owners of townhouse who saw painters working had actual notice of the work performed under the lien)).

138. 612 S.W.2d at 654.

139. 25 Tex. Sup. Ct. J. 133 (Jan. 16, 1982). See 601 S.W.2d 448 (Tex. Civ. App.—Dallas 1980).

140. Brannian, *Real Property, Annual Survey of Texas Law*, 35 Sw. L.J. 39, 82 (1981).

141. TEX. REV. CIV. STAT. ANN. arts. 5452-5506a (Vernon Supp. 1982).

142. 601 S.W.2d 448, 452-53 (Tex. Civ. App.—Dallas 1980).

143. *Id.*

144. 517 S.W.2d 262, 269 (Tex. 1974).

145. 25 Tex. Sup. Ct. J. at 134.

146. *Id.*

147. *Id.*

148. *Id.* The factors the court listed included:

[T]he manner and extent of attachment to the land or existing improvements; the extent to which removal would necessitate repairs, modification and/or protection of the land or existing improvements; the stage of completion of improvements under construction at the time removal is sought; the effect re-

that removal of the roof tiles would cause a material injury to the existing improvements as a matter of law because the tiles were an integral part of the building and were necessary to keep out the elements.¹⁴⁹ The court noted, however, that the materialman would be protected to the extent of the statutorily required ten percent retainage.¹⁵⁰ Although not reaching the point of injury to the tiles themselves, the court disapproved of the economic benefit test applied by the court of civil appeals, stating that a determination of economic benefit was neither necessary nor a part of the material injury test.¹⁵¹ Instead, the court stated that the test to be applied was whether the removal would materially injure the tiles.¹⁵²

D. Substantial Performance

The case of *BPR Construction & Engineering, Inc. v. Rivers*¹⁵³ involved the proper placing of the burden of proof of the cost of completion for a recovery under the equitable doctrine of substantial performance. In *Rivers* the homeowner sued the contractor for failure to perform a home repair construction contract in a workmanlike manner; the contractor generally denied and claimed in the alternative that he had substantially performed the contract. Additionally, the homeowner sued for removal of the contractor's mechanic's lien. After a jury finding that the contractor had not completed the contract but that he had substantially performed, the trial court granted a take nothing judgment for both parties and removed the mechanic's lien. At trial, neither the contractor nor the homeowner introduced any evidence to establish the cost of completion of the contract. The contractor appealed, claiming that the trial court had incorrectly placed the burden on it to prove the cost of completion in order to recover for substantial performance. Relying on the case of *Atkinson v. Jackson Brothers*,¹⁵⁴ the court of civil appeals held that the burden was

moval may have on habitability or use of the existing improvements; and the function of the improvements sought to be removed.

Id.

149. *Id.* The court noted that several cases allowed removal. *First Nat'l Bank v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1974) (dishwashers and disposals); *Richard H. Sikes, Inc. v. L & N Consultants, Inc.*, 586 S.W.2d 950 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (carpets, appliances, air conditioning and heating component, smoke detectors, burglar alarms, light fixtures and doorlocks); *Parkdale State Bank v. McCord*, 428 S.W.2d 121 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.) (entire structure removable from foundation); *Mogul Producing & Ref. Co. v. Southern Engine & Pump Co.*, 244 S.W. 212 (Tex. Civ. App.—Beaumont 1922, no writ) (pumps attached to existing machinery and foundation).

150. 25 Tex. Sup. Ct. J. at 134-35; TEX. REV. CIV. STAT. ANN. art. 5459 (Vernon Supp. 1982).

151. 25 Tex. Sup. Ct. J. at 135.

152. *Id.* A materialman can, therefore, remove an item even if it has no economic value to him so long as he can meet the material injury test requirements.

153. 608 S.W.2d 248 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

154. 270 S.W. 848 (Tex. Comm'n App. 1925, holding approved). In *Atkinson* the commission recognized the doctrine of substantial performance but determined that it was a claim of recovery made by the contractor and, therefore, the contractor was required to provide the evidence to compute the reduction in the contract price for defects and omissions. See *Todd Shipyards Corp. v. Jasper Elec. Serv. Co.*, 414 F.2d 8, 15 (5th Cir. 1969);

properly placed on the contractor to prove the damages in order to establish recovery under substantial performance.¹⁵⁵ Because the jury found that the contract had been substantially performed rather than fully performed, the contractor could not recover the full contract price.¹⁵⁶ Additionally, the contractor could not recover the value of its work under substantial performance without proof of the measure of deviation from the plans and specifications.¹⁵⁷ The court also upheld the removal of the lien because no money was owed to the contractor.¹⁵⁸ While concurring with the majority opinion, Chief Justice Guittard and Justice Robertson, in separate opinions, disagreed with the holding in *Atkinson*.¹⁵⁹ The justices contended that requiring a contractor to prove the cost of remedying the defects placed him in an awkward position since he must prove that he did not comply with the contract and thereby would lose his claim of full compliance or risk forfeiture of all compensation.¹⁶⁰ Certainly, the better rule in a substantial performance situation would be to require each party to prove its claim.¹⁶¹

E. Miscellaneous Cases

Attorney's Fees. In *Bettye-Jen, Inc. v. Riley* the court of civil appeals upheld the trial court's award of attorney's fees granted to an owner who was sued by an unpaid materialman after the contractor had paid the subcontractor, the owner had paid the full contract price, and the contractor had executed an affidavit swearing that all subcontractors and materialmen had been paid.¹⁶² The court found the contractor liable by way of indemnity for payment of the owner's attorney's fees because of the original contractor's duty to defend suits under article 5463 despite the fact that the materialman had taken a nonsuit.¹⁶³

Guittard, *Building Contracts: Damages and Restitution*, 32 TEX. B.J. 91, 122 (1969). See also *Graham Construction Co. v. Robert H. Pyle, Inc.*, 422 S.W.2d 485, 487 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.); *Treiber v. Schaeffer*, 416 S.W.2d 576, 579 (Tex. Civ. App.—San Antonio 1967, no writ).

155. 608 S.W.2d at 250.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 250-52.

160. *Id.*

161. In his concurring opinion Justice Robertson cites decisions in other jurisdictions that require the owner to prove his damages. See *id.* Justice Robertson also cited *Edwards & Blissard*, 440 S.W.2d 427, 431 (Tex. Civ. App.—Texarkana 1969, writ ref'd n.r.e.) and *Sharp v. Chrysler Corp.*, 432 S.W.2d 131, 135 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.) for the general rule that each party must prove its own claim. Justice Robertson concluded that "[t]he rule of *Atkinson* effectively abrogates the equitable doctrine of substantial performance." 608 S.W.2d at 252 (emphasis in original). See 3A A. CORBIN, CORBIN ON CONTRACTS § 710, at 343 (1960).

162. 614 S.W.2d 623, 624-25 (Tex. Civ. App.—Austin 1981, no writ).

163. *Id.* at 624. TEX. REV. CIV. STAT. ANN. art. 5463 (Vernon Supp. 1982) provides:

When an affidavit claiming a lien is filed by any one other than the original contractor under the provisions of this Act, the original contractor shall defend the action brought thereupon at his own expense. In case of judgment against the owner or his property upon the lien, he shall be entitled to deduct

Trust Funds. The court of civil appeals, in *Jensen v. First City National Bank*,¹⁶⁴ considered the application of article 5472e that provides that funds paid to a contractor under a construction contract are trust funds for the payment of subcontractors.¹⁶⁵ In *Jensen* a subcontractor filed suit against a bank, claiming that the bank converted funds belonging to him by applying funds that were received by the contractor for payment of the subcontract work to another debt of the contractor.¹⁶⁶ The bank applied the funds it received for the construction to another debt of the contractor because the debt was secured by a security interest in the contractor's accounts receivable. The court found that the statute that creates a trust fund for subcontractors and makes it unlawful to divert the funds expressly exempts the bank from liability.¹⁶⁷ The court, therefore, affirmed the trial court's decision against the subcontractor.¹⁶⁸

F. Avoidance in Bankruptcy

The bankruptcy judge in *In re Boots Builders, Inc.* avoided a mechanic's lien for the installation of an air conditioning system in the debtor's house because the lien was not properly perfected.¹⁶⁹ The bankruptcy court held that although the contractor had filed a lien affidavit within the 120-day period prescribed by article 5453,¹⁷⁰ the description in the affidavit was insufficient to establish a valid lien.¹⁷¹ An additional lien affidavit containing a corrected description also did not create a valid lien because it was filed after the statutory period had passed.¹⁷² The bankruptcy court also held that the contractor did not have a constitutional lien because the trustee and the debtor were considered bona fide purchasers under federal law and, under Texas law, a bona fide purchaser is not subject to a constitutional lien.¹⁷³ In addition, the court determined that the *Whirlpool* doc-

from the amount due the contractor the amount of said judgment and costs; and, if he shall have settled with the contractor in full, he shall be entitled to recover from the contractor any amount so paid for which the contractor was originally liable.

164. 616 S.W.2d 452 (Tex. Civ. App.—Houston [14th Dist.] 1981 writ ref'd n.r.e.).

165. TEX. REV. CIV. STAT. ANN. art. 5472e (Vernon Supp. 1982).

166. The subcontractor alleged that the funds were trust funds under article 5472e and that the bank had violated the statute by applying the money to the contractor's debt rather than holding the funds in trust for payment of the subcontractors. 616 S.W.2d at 454.

167. *Id.* at 454. Section 4 of article 5472e specifically provides, "This Act shall have no application to any bank, savings and loan association or other lender . . . in connection with any transaction to which this Act is applicable." TEX. REV. CIV. STAT. ANN. art. 5472e (Vernon Supp. 1982).

168. 616 S.W.2d at 454.

169. 11 Bankr. 635, 639 (Bankr. N.D. Tex. 1981). By avoiding the lien, the court would treat the mechanic/materialman as a general rather than a secured creditor. See 11 U.S.C. § 546(b) (Supp. IV 1980).

170. TEX. REV. CIV. STAT. ANN. art. 5453 (Vernon Supp. 1982).

171. 11 Bankr. at 638-39. The description in fact described a different piece of property. *Id.* at 639. See *Myers v. Houston*, 88 Tex. 126, 30 S.W. 912 (1895); *Scholes v. Hughes*, 77 Tex. 482, 14 S.W. 148 (1890).

172. 11 Bankr. at 638-89.

173. *Id.* (citing *Strang v. Pray*, 89 Tex. 525, 35 S.W. 1054 (1896); *Lyon v. Elser*, 72 Tex. 304, 12 S.W. 177 (1888)).

trine would not apply to allow the contractor to remove the air conditioning equipment because the contractor had not properly perfected its statutory lien which was a prerequisite to removal under the *Whirlpool* doctrine.¹⁷⁴ Finally, the court determined that the equipment was not personalty, therefore, the contractor was not entitled to a constitutional lien.¹⁷⁵ The court, therefore, concluded that the contractor did not have a statutory or constitutional lien on the property.¹⁷⁶

III. FORECLOSURE

In *Valley v. Patterson*¹⁷⁷ the property owners appealed the trial court's denial of a temporary injunction to prevent the trustee under the deed of trust given on the property from selling the property at a foreclosure sale. The Corpus Christi court of civil appeals granted an injunction to preserve jurisdiction and the subject matter of the appeal.¹⁷⁸ The note secured by the deed of trust in *Valley* called for installments due on the 5th of every month. The January 5th installment was made on January 6th, but was accepted by the noteholder. The following month the payment was not received by the noteholder until the 11th. On the 9th, the trustee, who was also a payee under the note, sent a telegram notifying the owners that the payment had not been made, the debt was being accelerated, and that the entire amount was due and payable immediately. Additionally on the 9th, the trustee mailed a letter with a copy of the notice of foreclosure sale to the debtors, stating that the property would be sold on the 3rd of the next month unless the entire debt was paid before that time. The letter and notice were received by the owners on the 11th. On appeal, the owners argued that the trustee had not complied with article 3810¹⁷⁹ since they did not receive the notice 21 days prior to the sale. The court of civil appeals disagreed, finding that the statute clearly provided that the date of depositing the notice in the mails was the controlling date, not the date of re-

174. 11 Bankr. at 639. See *First Nat'l Bank v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1974).

175. 11 Bankr. at 639-41. The contractor argued that the equipment was personalty because it was easily removable and further it was "made" as required by the constitutional lien provisions. The contractor, therefore, argued that it had a constitutional lien because such a lien did not require the compliance with the Hardeman Act. *Id.* at 639.

176. *Id.* at 641.

177. 614 S.W.2d 867 (Tex. Civ. App.—Corpus Christi 1981 no writ).

178. *Id.* at 869-70.

179. TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1982) provides:

In addition, the holder of the debt to which the power is related shall at least 21 days preceding the date of sale serve written notice of the proposed sale by Certified Mail on each debtor obligated to pay such debt according to the records of such holder. Service of such notice shall be completed upon deposit of the notice, enclosed in a postpaid wrapper, properly addressed to such debtor at the most recent address as shown by the records of the holder of the debt, in a post office or official depository under the care and custody of the United States Postal Service. The affidavit of any person having knowledge of the facts to the effect that such service was completed shall be prima facie evidence of the fact of service.

ceipt.¹⁸⁰ The owners also alleged that the note had not been properly accelerated in that the trustee failed to first demand payment of the late installment. The court noted that the rule requiring demand of the late installment prior to the acceleration of the debt¹⁸¹ was inapplicable because the deed of trust contained an express provision whereby the owners waived "all notices, demands for payment, presentations for payment, notices of intention to accelerate the maturity protest and notice of protest, as to this note and as to each, every and all installments."¹⁸² Furthermore, the court distinguished the line of cases calling for the demand because in those cases there was no evidence as to any such waiver.¹⁸³ In addition, finding no evidence of partiality, the court found no merit in the owner's contention that the trustee could not act impartially because he was a co-payee of the note.¹⁸⁴ Moreover, the court noted that a mortgagee may act as a trustee and purchase the property at the foreclosure sale.¹⁸⁵ Lastly, the owners claimed that the trustee had waived his right to accelerate the note for late payment by accepting late payments in the past. The court distinguished the cases that have held that a noteholder has waived his right to accelerate by accepting late payments, finding that in those cases there had been the acceptance of numerous late payments.¹⁸⁶ In the instant case, the court held that the acceptance of one late payment was not sufficient to constitute a waiver of the right to demand timely payment.¹⁸⁷ Finding that there was no evidence that the late payments were the result of accident, mistake, or inequitable conduct by the trustee, the court dissolved the injunction, and affirmed the trial court's decision against the owners.¹⁸⁸

A. Notice

During the survey period the Texas Supreme Court considered, in *Lido*

180. 614 S.W.2d at 871 (citing Texas Real Estate Comm'n v. Howard, 538 S.W.2d 429 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.); Johnson Serv. Co. v. Climate Control Contractors, Inc., 478 S.W.2d 643 (Tex. Civ. App.—Austin 1972, no writ)).

181. The court quoted the rules: "Where the acceleration clause in a promissory note leaves it optional with the holder whether he shall declare the whole amount due upon failure to pay any installment of principal or interest, such holder cannot without presentment for payment, exercise this option to declare the whole amount due." 614 S.W.2d at 871.

182. *Id.* at 871-72. *Accord* Donaldson v. Mansel, 615 S.W.2d 799 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ) (no demand necessary when there is an express waiver).

183. 614 S.W.2d at 872.

184. *Id.* at 872. *See* Hammonds v. Holmes, 559 S.W.2d 345 (Tex. 1977) (stating rule that trustee must act impartially); First Fed. Sav. & Loan Ass'n v. Sharp, 359 S.W.2d 902 (Tex. 1962) (trustee's sale set aside when trustee rejected highest bid but accepted bid of other trustee).

185. 614 S.W.2d at 872.

186. *Id.* (distinguishing, McGowan v. Pasol, 605 S.W.2d 728 (Tex. Civ. App.—Corpus Christi 1980, no writ); *In re* Marriage of Rutherford, 573 S.W.2d 299 (Tex. Civ. App.—Amarillo 1978, no writ); Vaughan v. Crown Plumbing & Sewer Serv., Inc., 523 S.W.2d 72 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.)).

187. 614 S.W.2d at 873.

188. *Id.*

International, Inc. v. Lambeth,¹⁸⁹ an appeal from a summary judgment against a mortgagor who sought to have a trustee's sale set aside on the grounds that the mortgagee had not complied with the notice requirements of article 3810.¹⁹⁰ In *Lido* the mortgagee accelerated the debt and sold the property at a trustee's sale while the mortgagor, an Iranian national, was out of the country. According to the summary judgment evidence, notice of the sale was sent only to the address contained in the deed of trust. An affidavit of the debtor, however, alleged that prior to leaving for Iran he had given the mortgagee his address in Iran and the local address of his interpreter, and had arranged for payment of the debt during his absence. In reaching its decision, the court noted that article 3810 required notice to be sent to "the most recent address as shown by the records of the holder of the debt."¹⁹¹ The supreme court, therefore, reversed the summary judgment finding that the mortgagor's affidavit raised an issue of fact as to whether the holder of the debt had complied with the notice requirements of article 3810.¹⁹²

The court of civil appeals also considered whether a mortgagee had complied with the notice requirements of article 3810 in *Krueger v. Swann*.¹⁹³ In *Krueger* the court held that notice sent by certified mail to the debtor's latest address contained in the mortgagee's records was sufficient compliance with the statute despite the fact that the debtor had moved.¹⁹⁴ Furthermore, the court held that two other debtors were not entitled to notice by mail because the creditor's records did not contain their addresses, and the statute, therefore, imposed no duty on the creditor to notify them.¹⁹⁵

In *Martinez v. Beasley*¹⁹⁶ the debtors challenged a trustee's sale of their residence, alleging that the notice of the sale was inadequate to meet the requirements of article 3810. The debtors claimed the notice was inadequate because only one letter was sent to them as Mr. and Mrs. Martinez rather than a letter to each of them individually as debtors under the note.¹⁹⁷ The court of civil appeals, approving of the decision in *Hausmann*

189. 611 S.W.2d 622 (Tex. 1982).

190. TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1982) requires that notice of the sale be sent to the debtor by certified mail at least 21 days prior to the date of the sale.

191. 611 S.W.2d at 624. See TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1982) which provides:

Service of such notice shall be completed upon deposit of the notice, enclosed in a postpaid wrapper, properly addressed to such debtor at the most recent address as shown by the records of the holder of the debt, in a post office or official depository under the care and custody of the United States Postal Service.

192. 611 S.W.2d at 624.

193. 604 S.W.2d 454 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).

194. *Id.* at 457.

195. *Id.* The court stated that, "[t]he general purpose of the statute is to provide only a minimum level of protection for the debtor, and it provides for only constructive notice of the foreclosure." *Id.*

196. 616 S.W.2d 689 (Tex. Civ. App.—Corpus Christi 1981, no writ).

197. *Id.* at 690. TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon, Supp. 1982) reads, "the

v. Texas Savings & Loan Association,¹⁹⁸ held that one letter sent by certified mail to both husband and wife at their true address complied with the statutory notice of foreclosure requirements.¹⁹⁹

B. Deficiency Judgment/Choice of Law

The court of civil appeals addressed the application of a choice of law clause in *First Commerce Realty Investors v. K-F Land Co.*²⁰⁰ In *First Commerce* the note, deed of trust, and guaranty all contained clauses which stated that Louisiana law would govern the transaction even though the real property was located in Texas.²⁰¹ Furthermore, the loan transaction took place in New Orleans and the note was payable in Louisiana. After the maker of the note defaulted, the holder foreclosed on the land and filed suit for a deficiency. The trial court granted a summary judgment for the debtor because under Louisiana law the creditor was not entitled to a deficiency judgment after a foreclosure sale.²⁰² Finding that the suit was related to the collection of a debt rather than the foreclosure of Texas real estate, and finding a reasonable relation between the contract and the chosen state of Louisiana, the court of civil appeals determined that the express provisions calling for the application of Louisiana law should control and affirmed the trial court's decision.²⁰³

C. Homestead

In *Tremaine v. Showalter*²⁰⁴ the plaintiff appealed an order denying his request for a temporary injunction to prevent a foreclosure sale. Claiming the property as his homestead, the plaintiff argued that a previous sale to his closely held corporation was a pretended sale to enable him to mortgage his homestead and that a sale under the deed of trust given by the corporation should be prevented. Upholding the trial court's denial of the temporary injunction, the court of civil appeals found that the facts clearly

holder of the debt . . . shall . . . serve written notice . . . by certified mail on each debtor obligated to pay such debt"

198. 585 S.W.2d 796 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.) (one letter to husband and wife was sufficient).

199. 616 S.W.2d at 690.

200. 617 S.W.2d 806 (Tex. Civ. App.—Houston [14th Dist] 1981, writ ref'd n.r.e.).

201. *Id.* at 807. The note provided it "shall be governed by, interpreted and construed in accordance with the laws of the State of Louisiana." *Id.* The deed of trust provided:

The loan, the payment of the note evidencing same being secured hereby, is a Louisiana transaction. This Deed of Trust and the note and related loan documents have been executed and delivered in the State of Louisiana and are to be construed under and in accordance with the laws of the State of Louisiana.

Id. The guarantee provided, "[t]he transaction for which this guarantee was required is a Louisiana loan transaction. This guarantee shall be construed in accordance with the laws of the State of Louisiana, and such laws shall govern the interpretation, construction and enforcement hereof." *Id.*

202. See LA. CODE CIV. PRO. ANN. arts. 2771-72 (West 1961); LA. REV. STAT. ANN. §§ 13:4106-4107 (West 1968).

203. 617 S.W.2d at 808-09. The court found no overriding public policy of Texas to prevent applying the Louisiana law. *Id.* at 809.

204. 613 S.W.2d 35 (Tex. Civ. App.—Corpus Christi 1981, no writ).

showed that the plaintiff was married to one woman but was living in the house with another and therefore, "[t]he claim of a homestead is not maintainable by a man and woman living together in an unmarried state."²⁰⁵

D. Due on Sale Clause

In a case of first impression, the Amarillo court of civil appeals considered whether a "due on sale" clause contained in a deed of trust was invalid as a restraint on alienation in *Sonny Arnold, Inc. v. Sentry Savings*.²⁰⁶ In *Sonny Arnold* the deed of trust contained a provision that allowed the lender the option to accelerate the entire balance of the debt upon the sale of the mortgaged property.²⁰⁷ In addition, the agreement expressly provided that even if the lender approved of the purchaser's credit and management ability it could require an increase in the interest rate. Upon the sale of the mortgaged property without the lender's consent, the lender accelerated the balance of the debt and posted the property for trustee's sale.²⁰⁸ Thereafter, the purchasers and seller sought a temporary injunction to enjoin the trustee's sale. The injunction was denied at the trial level and granted by the court of appeals in order to preserve its jurisdiction.²⁰⁹ On appeal the plaintiffs contended that the due on sale clause was invalid as an illegal restraint on alienation. In reaching its decision, the court of civil appeals noted the differing views of other jurisdictions regarding the

205. *Id.* at 37. See TEX. CONST. art. XVI, § 50 (constitution provides for homestead for family and for single adult); *Barker v. Lee*, 337 S.W.2d 637 (Tex. Civ. App.—Eastland 1960, no writ); *Senegar v. La Vaughan*, 230 S.W.2d 311 (Tex. Civ. App.—Beaumont 1950, no writ).

206. 615 S.W.2d 333 (Tex. Civ. App.—Amarillo 1981, writ granted). See generally Comment, *The Due-On-Sale Clause as a Reasonable Restraint on Alienation—A Proposal for Texas*, 8 ST. MARY'S L.J. 514 (1976); Comment, *Is The Practice Of Raising The Interest Rate In Return For Not Exercising An Acceleration Clause On Assumption Of A Mortgage Illegal In Texas As A Restraint On Alienation?* 13 S. TEX. L.J. 296 (1972). See also *Jamail v. Gillingwater*, 612 S.W.2d 279 (Tex. Civ. App.—Austin 1981, no writ) (court upheld temporary injunction on equitable grounds preventing foreclosure sale after lender withheld consent to sale).

207. The deed of trust provided:

TRANSFERS OF THE PROPERTY OR BENEFICIAL INTERESTS IN BORROWER: ASSUMPTION. On sale or transfer of (i) all or any part of the Property, or any interest therein, or (ii) beneficial interests in Borrower . . . (if Borrower is not a natural person or persons but is a corporation, partnership, trust or other legal entity), Lender . . . may, at Lender's option, declare all of the sums secured by this Instrument to be immediately due and payable, and Lender may invoke any remedies permitted by paragraph 27 of this Instrument. This option shall not apply in case of . . . (b) sales or transfers when the transferee's creditworthiness and management ability are satisfactory to Lender and the transferee has executed, prior to the sale or transfer, a written assumption agreement containing such terms as Lender may require, including, if required by Lender, an increase in the rate of interest payable under the Note.

Id. 615 S.W.2d at 335. Paragraph 27 allows acceleration and sale by the Trustee. *Id.*

208. The lender had agreed to allow the purchasers to assume the debt if the interest rate on the loan was raised from 9.75% to 10.5%. *Id.* at 335. The terms of the sale provided that the buyers did not assume the debt; rather the seller remained liable and agreed to indemnify the buyers from any liability arising from the debt or deed of trust. *Id.*

209. *Id.* at 336.

due on sale clause²¹⁰ and discussed the holding of the California Supreme Court in *Wellenkamp v. Bank of America*.²¹¹ The court noted that in *Wellenkamp* the California court found that the clause was a restraint on alienation and that it would only be enforced when the sale would result in an impairment of the collateral or an increase in the risk of default, but not merely to increase the lender's rate of return.²¹² Unmoved by the decisions in other jurisdictions, the court determined that its decision should be reasoned from Texas decisions.²¹³

Finding restraints on alienation to be disfavored in Texas,²¹⁴ the court noted that void restraints are generally classified as disabling restraints, promissory restraints, or forfeiture restraints.²¹⁵ In addition, an indirect restraint was found not to come within these classes of invalid restraints.²¹⁶ The court also found that the due on sale clause was not a direct, disabling, promissory, or forfeiture restraint because it (1) arose to secure repayment of a loan rather than from a grant to the debtor, (2) did not prohibit or prevent the transfer of the property, and (3) did not create a contractual obligation independent of and beyond the debtor's obligation to pay the debt.²¹⁷ Moreover, the clause operated only upon the debtor's decision to sell and, consequently, was at most an indirect restraint on alienation.²¹⁸ The court, therefore, held that the due on sale clause was not an invalid

210. 615 S.W.2d at 336-37. The court cited the following cases upholding similar clauses: *Tierce v. APS Co.*, 382 So. 2d 485 (Ala. 1979); *Baker v. Loves Park Sav. & Loan Ass'n*, 61 Ill. 2d 119, 333 N.E.2d 1 (1975); *Occidental Sav. & Loan Ass'n v. Venco*, 206 Neb. 469, 293 N.W.2d 843 (1980); *Title, Inc. v. Holmes*, 92 Nev. 363, 550 P.2d 1271 (1976); *Century Fed. Sav. & Loan Ass'n v. Van Glahn*, 144 N.J. Super. 48, 364 A.2d 558 (1976).

The court cited the following cases that support the view that the clause is invalid: *Patton v. First Fed. Sav. & Loan Ass'n*, 118 Ariz. 473, 578 P.2d 152 (1978); *Baltimore Life Ins. Co. v. Harn*, 15 Ariz. App. 78, 486 P.2d 190 (1971), *appeal denied*, 108 Ariz. 192, 494 P.2d 1322 (1972); *Tucker v. Pulaski Fed. Sav. & Loan Ass'n*, 252 Ark. 849, 481 S.W.2d 725 (1972); *Wellenkamp v. Bank of America*, 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978). *See generally* Annot., 69 A.L.R.3d 713 (1976).

211. 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978).

212. 615 S.W.2d at 337.

213. 615 S.W.2d at 338.

214. *Id.* (citing *Citizens State Bank v. O'Leary*, 140 Tex. 345, 350-51, 167 S.W.2d 719, 721 (1942)).

215. 615 S.W.2d at 338. A restraint on alienation is defined as follows:

(1) A restraint on alienation, as that phrase is used in this Restatement, is an attempt by an otherwise effective conveyance or contract to cause a later conveyance (a) to be void; or (b) to impose contractual liability on the one who makes the later conveyance when such liability results from a breach of an agreement not to convey; or (c) to terminate or subject to termination all or part of the property interest conveyed.

(2) If a restraint on alienation is of the type described in Subsection (1), Clause (a), it is a disabling restraint.

(3) If a restraint on alienation is of the type described in Subsection (1), Clause (b), it is a promissory restraint.

(4) If a restraint on alienation is of the type described in Subsection (1), Clause (c), it is a forfeiture restraint.

615 S.W.2d 338-39 n.15 (citing RESTATEMENT OF PROPERTY § 404 (1944)).

216. 615 S.W.2d at 339.

217. *Id.*

218. *Id.*

restraint on alienation.²¹⁹ Noting that the purpose of a deed of trust was for security of the debt, the court stated: "The fact that the lender may be motivated to consent to the conveyance only to obtain an increase in the rate of interest payable under the note does not, in our opinion, render the security instrument any less legal."²²⁰ Relying on the express language of the due on sale clause and the freedom of contract, the court concluded that its enforcement was not limited to the protection of the security.²²¹ Although the clause might invoke a harsh remedy, the court noted the parties had contracted for such a result.²²² The court did, however, recognize that the Texas courts would refuse to enforce such a clause under fraudulent or inequitable conditions.²²³

The Austin court of civil appeals also upheld the use of a due on sale clause in *Crestview, Ltd. v. Foremost Insurance Co.*²²⁴ In *Crestview* the clause provided:

In the event Grantors, or any owner of the Mortgaged Premises, without first obtaining approval of Noteholder (which approval shall not be unreasonably withheld), should sell or otherwise dispose of the Mortgaged Premises, or any part thereof, at any time before this Deed of Trust is fully released and discharged, Noteholder shall have the option to declare the indebtedness hereby secured due and payable.²²⁵

The court in *Crestview* found the due on sale clause to be clear and unequivocal and therefore enforceable as written.²²⁶ Despite the inclusion of the provision "which approval shall not be unreasonably withheld" the court found that there was sufficient evidence to support the trial court's determination that the fact that the lender conditioned approval on either an increase in the interest rate or a substantial reduction in capital was not "unreasonable, unjust, inequitable or oppressive."²²⁷ Furthermore, the court found that the due on sale clause actually facilitated alienation rather than restrained it in that without such clause a lender would only lend at higher rates and for shorter terms.²²⁸ In his dissent, Chief Justice Phillips reasoned that the trial court should have granted a temporary injunction against the trustee's sale because there were factual issues as to whether the lender had "unreasonably withheld" its consent to the sale.²²⁹

219. *Id.*

220. *Id.*

221. *Id.* See generally *East Texas Fire Ins. Co. v. Kempner*, 87 Tex. 229, 27 S.W.122 (1894) (strict adherence to terms of contract); *Stahl Petroleum Co. v. Phillips Petroleum Co.*, 550 S.W.2d 360, 368 (Tex. Civ. App.—Amarillo 1977), *aff'd*, *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978) (refusing to revise contract where terms were unambiguous).

222. 615 S.W.2d at 340.

223. *Id.*

224. 621 S.W. 2d 816 (Tex. Civ. App.—Austin 1981, no writ).

225. *Id.* at 818.

226. *Id.* at 820.

227. *Id.* at 819.

228. *Id.* at 824.

229. *Id.* at 831-33.

E. Bankruptcy

During the survey period the Fifth Circuit Court of Appeals decided two cases that considered whether a foreclosure sale made under a deed of trust was a transfer that was voidable under bankruptcy law as a preference.²³⁰ In *Durrett v. Washington National Insurance Co.*²³¹ the debtor in possession under chapter XI²³² sought to void the foreclosure sale that was held within one year of filing his bankruptcy petition because the sale price was not a "fair" consideration or a "fair equivalent" under the Bankruptcy Act.²³³ Refusing to set aside the sale, the district court held that the sale price was a fair consideration and a fair equivalent. The Fifth Circuit Court of Appeals reversed, holding that the sale price of 57.7 percent of the fair market value of the property was not a fair equivalent.²³⁴ The court, therefore, declared that the foreclosure sale was voidable.²³⁵ In addition, the court held that the trustee's sale was a "transfer" within the definition of the Bankruptcy Act even though the debtor had transferred the property to the trustee by executing the deed of trust.²³⁶ The court reasoned that the

230. See *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547 (5th Cir. 1981); *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201 (5th Cir. 1980). Both *Abramson* and *Durrett* were decided under the now repealed Bankruptcy Act of 1898.

231. 621 F.2d 201 (5th Cir. 1980).

232. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, as amended (repealed 1978). The facts of the case occurred prior to the repeal of the Bankruptcy Act by the Bankruptcy Code, 11 U.S.C. § 101 (Supp. IV 1980), so the repealed Act applied.

233. The court noted the provisions of section 67(d) of the Bankruptcy Act, which provided:

(1) For the purpose of, and exclusively applicable to, this subdivision: . . .

(e) consideration given for the property or obligation of a debtor is "fair"

(1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred

(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent. . . .

(6) A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this title, which is fraudulent under this subdivision against creditors of such debtor having claims provable under this title, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value: . . . *and provided further*, That such purchaser, lienor, or obligee, who without actual fraudulent intent has given a consideration less than fair, as defined in this subdivision, for such transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment. . . .

Chandler Act, ch. 575, § 67d, 52 Stat. 877 (1938), as amended (repealed 1978), *quoted in* 621 F.2d at 202. See 11 U.S.C. § 548(a) (Supp. IV 1980 (current version)).

234. 621 F.2d at 204. The fair market value of the property was \$200,000.00 and the sale price was \$115,400.00. The court indicated that it was unable to find any decision that approved a price of less than 70 percent of market value. *Id.* at 203. See *Schafer v. Hammond*, 456 F.2d 15 (10th Cir. 1972) (50% was not fair consideration).

235. 621 F.2d at 204.

236. *Id.* A transfer under the act is defined as:

(30) "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or

transfer by the debtor was not final until the date of the trustee's sale.²³⁷

The Fifth Circuit also held a nonjudicial foreclosure sale to be a fraudulent transfer under section 67(d)²³⁸ in *Abramson v. Lakewood Bank and Trust Co.*²³⁹ The court relied on its decision and reasoning in *Durrett* to conclude that the time of transfer was the time of the foreclosure sale and not the time the deed of trust was executed.²⁴⁰ Circuit Judge Thomas A. Clark dissented in *Abramson*, concluding that the foreclosure sale was not "a transfer *by* the debtor" because the debtor merely defaults; it is the mortgagee who forecloses and sells the property.²⁴¹ Furthermore, Judge Clark opined that when the deed of trust was executed more than twelve months before the bankruptcy filing, "the power of sale is vested absolutely in the mortgagee or trustee."²⁴² Lastly, Judge Clark noted that the "cloud created over mortgages and trust deeds by making foreclosure sales subject to being voided by a bankruptcy trustee will naturally inhibit a purchaser other than the mortgagee from buying at foreclosure," leading to lower prices and greater deficiency judgments.²⁴³

upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance [sic], gift, security or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor.

Chandler Act, ch. 575, § 1(30), 52 Stat. 842 (1938) (repealed 1978), *quoted at*, 621 F.2d at 204. *See* 11 U.S.C. § 101(40) (Supp. IV 1980) (current definition of transfer); *see generally* 1 COLLIER ON BANKRUPTCY ¶ 1.30, at 130.28(2)(3) (14th ed. 1967).

237. 621 F.2d at 204.

238. Chandler Act, ch. 575, § 67d, 52 Stat. 877 (1938) and amendments (repealed 1978). *See* 11 U.S.C. § 548(a) (1978) (Supp. IV 1980) (current version).

239. 647 F.2d 547 (5th Cir. 1981).

240. *Id.* at 548-49.

241. *Id.* at 549.

242. *Id.* at 549-50.

243. *Id.* at 550.

